IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. ~~925~~ 43

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

DONALD S. SIEGEL,
BARTLEY, SIEGEL & BARTLEY,
130 South Bemiston Avenue,
Clayton, Missouri 63105,
PA. 7-0922,

GRAY L. DORSEY,
122 Ridge Crest Drive,
Chesterfield, Missouri 63017,
HO. 9-3362,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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AUTHORITIES CITED.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner (R. 1) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on October 20, 1966.

OPINIONS BELOW.

The District Court entered judgment without an opinion on May 13, 1965 (R. 131-132). The opinion of the Court of Appeals for the Eighth Circuit, not yet published, is reprinted *infra*, App. A.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 20, 1966 (*infra,* App. A, p. 17). The jurisdiction of this Court rests on 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act.

STATUTES INVOLVED.

Section 1 of the Sherman Act (26 Stat. 209; 50 Stat. 693; 69 Stat. 282; 15 U. S. C., Sec. 1), provides that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

Section 4 of the Clayton Act (38 Stat. 731; 15 U. S. C., Sec. 15), provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

STATEMENT.

Petitioner was, from June 1, 1956, to October 31, 1964, the home delivery carrier of the St. Louis Globe-Democrat newspaper on Route 99 in a suburban area comprising part of Kirkwood, Missouri (R. 1, 23, 48-49). He bought Route 99 from the previous carrier and sold to another that part of the Route remaining to him after the incidents involved in this suit (R. 22, 50-52).

Respondent is a corporation which publishes the St. Louis **Globe-Democrat**, a morning newspaper circulated in Illinois and Missouri by mail and by home delivery routes (R. 1-2, 82-83). Until 1961, the relationship between the newspaper and its home delivery carriers was regulated by a collective bargaining agreement (R. 53-54). On February 16 and 17, 1961, the Business Agent of St. Louis Newspaper Carriers' Union No. 450, wrote G. D. Bauman, Business Manager of the newspaper, advising him that the carrier contract would terminate May 26, 1961, and inviting negotiations for a new contract. On May 16, 1961, Mr. Bauman replied that on advice of counsel the newspaper took the position that home delivery carriers are not employees but independent merchants; that it could not negotiate with the carriers about the pricing policy, which must be determined unilaterally by it; that a threatened strike by the carriers would be considered by the newspaper to be a boycott by a group of merchants and that redress would be sought by actions for treble damages under State and Federal antitrust laws (R. 53-55).

On May 26, 1961, the contract between the newspaper and the carriers' union expired and was not renewed (R. 54, 58).

In Mr. Bauman's letter of May 16, 1961, to the Business Agent of the carriers, and in a policy statement issued to

all carriers and received by Petitioner, the newspaper stated that it would announce a suggested retail price to subscribers and if a carrier charged more it would refuse to sell newspapers to him, or would terminate his exclusive right to sell "the Globe-Democrat by home delivery in his territory," but he would be given 60 days within which to sell his route to a satisfactory carrier (R. 54, 60). The suggested retail price was published daily in an ad in the paper (R. 29-30).

Beginning in 1961, the newspaper increased its suggested retail price per month for home delivery of the daily paper from $1.30 to $1.60, and continued the $1.60 suggested price at all subsequent times. Petitioner charged his customers on home delivery Route 99 the suggested $1.60 price if they paid in advance, but otherwise, he charged $1.70 (R. 32, 33). He had few customers who paid in advance (R. 33).

In 1961, and again early in 1962, Walter I. Evans, the Circulation Director of the newspaper, telephoned Petitioner, saying that he had information that Petitioner was charging $1.70 rather than the suggested $1.60, and warning him that the newspaper could not tolerate that, and Petitioner would have to charge the suggested price (R. 34, 35). Petitioner replied that he was an independent merchant, received no pension or vacation payments from the newspaper as an employee would; and that he would set his own price (R. 34).

On June 1, 1962, Mr. Evans wrote Petitioner protesting his $1.70 price, and warning that if he persisted, "we will take whatever legal steps appear to be necessary to effectuate our position" (R. 35). Following receipt of that letter, Petitioner had a meeting with Circulation Director Evans and Business Manager Bauman in Evans's office, at which he was told that the newspaper would have to control the retail price; that they could not tell Petitioner

what to charge, but if he charged more than the suggested retail price, they did not have to do business with him; and that Petitioner should not use a "bill" which had a price of $1.70 printed on it (R. 36-37). Petitioner continued to charge $1.70 for the daily paper (R. 38).

The Globe-Democrat was delivered to homes on 165 to 173 routes (R. 83-84). Throughout the period from May 26, 1961, when the Union contract expired, to May 20, 1964, the newspaper took no action against any of the home delivery carriers to secure compliance with its suggested retail price, except to contact carriers whose subscribers had called attention to the fact that they were charging more than the suggested price and requesting them to comply (R. 87). Over the three-year period prior to May 20, 1964, Petitioner lost about half a dozen subscribers as a result of charging $1.70 instead of the publisher's suggested $1.60 (R. 38). On May 20, 1964, Petitioner had 1,201 daily subscribers (R. 38).

On May 20, 1964, the newspaper sent Petitioner a letter, signed by Circulation Director Evans and composed with the assistance of Business Manager Bauman (R. 8, 97). The letter informed Petitioner that the newspaper had received and referred to him "a large number of complaints" from his customers that he was charging more than the publisher's suggested price, and continued:

> "The system we customarily follow of respecting, as exclusive, territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over-pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves, or for resale by another carrier, at the lower prices in the over-priced territory.

"In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter" (R. 8).

The policy statement referred to was first issued in 1959 with reference to independent news dealers. Bauman's letter of May 16, 1961, stated that it also applied to carriers. On May 24, 1962, it was reissued and made specifically applicable to home delivery carriers (R. 55-60). The territories were exclusive only as to other home delivery carriers. Petitioner, as well as other carriers, had competition within his route from store sales, street racks, and street corner salesmen, who also made some home deliveries (R. 26-27, 52, 72, 82).

The enclosed letter informed addressees that readers who subscribe "through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price." It further stated the amount of the suggested price, and invited completion and return of an enclosed card which would authorize the Globe-Democrat to make delivery at the suggested price. The letter was signed by Circulation Director Evans (R. 9, 10).

The letters were mailed out to the residents on Petitioner's route, and were followed by telephone and door-to-door solicitation by Milne Circulation Sales Corporation, under contract with the newspaper (R. 41-43, 61-70). This solicitation asked persons paying "the extra price" if they wanted to "get the paper at the regular price" (R. 66). Milne had done circulation solicitation for the Globe-Democrat for 4 or 5 years, but had never based such solicitation on an inquiry as to the carrier's compliance with suggested retail price (R. 66). The Globe-Democrat had never taken this kind of action against any other carrier (R. 87). It had no dissatisfaction of any kind with Petitioner's performance of his services as a

home delivery carrier, except his pricing (R. 88-89, 95-96). Business Manager Bauman said that he wished other carriers would perform their work as well as Petitioner (R. 96). The only reason for soliciting the customers of Petitioner by the described means was admitted by Evans to be to maintain the publisher's suggested retail price (R. 88).

The result of the solicitations was subjection of Petitioner to angry epithets, opprobrium and serious loss of income, with little decrease in expenses (R. 41-42). He lost more than 300 of his 1,201 daily customers (R. 41, 44-47). On June 12, 1964, nineteen days after the solicitations began, Petitioner lowered his price from $1.70 to the suggested retail price of $1.60, in order to keep his remaining customers (R. 45-46, 49).

The newspaper used makeshift means to make deliveries to the customers it had solicited away from Petitioner. It owned no equipment for home deliveries, and had no employees for this purpose (R. 84-87). It had not been in the carrier business; did not want to be in it and had no thought of making a profit from delivering to Petitioner's former customers (R. 84, 96-97). Temporarily, employees with other duties made the deliveries, using their personal cars (R. 91). Early in July, the newspaper advertised for a carrier to deliver to the customers it had taken away from Petitioner (R. 75). John Kroner, a carrier on another Globe-Democrat route, applied for and was given the list of former customers of Petitioner on his Route 99, which was designated a new Route, with the number "198", although the newspaper had not more than 173 routes (R. 71-76, 83-84, 99-100). The right to serve these 300 customers was given to Kroner without charge (R. 72-73, 92, 99). Circulation Manager Charles B. Cleaver stated that he told Kroner he could have the profit of serving these customers; that it was uncertain how long he could deliver to them, that these customers had been

taken from Albrecht for overcharging; and that he reminded Kroner of the newspaper's resale price policy (R. 99-101). Kroner testified he was told that he might have to give back the customers if Petitioner Albrecht sold "the route," or if "Albrecht got straightened out with the Globe-Democrat" (R. 76-77).

On July 27, 1966, Petitioner met with Business Manager Bauman, in his office. Bauman said the customers would be given back to Petitioner if he would agree to charge no more than the suggested retail price (R. 47, 96). Petitioner refused; saw his attorney, and this action was filed August 12, 1964 (R. 1, 47). On August 21, 1964, in a letter signed by Evans, the newspaper notified Petitioner "that your appointment as carrier is terminated," but he would be given 60 days to sell his route to a person whose credit, experience and efficiency was acceptable to it (R. 48-49). This period was subsequently extended from October 21 to October 31, to simplify billing, which is usually on a monthly basis (R. 49).

Eugene Schwarzenbach offered Petitioner $24,000.00 for Route 99 (R. 50). On September 15, 1964, Schwarzenbach and Albrecht met with Evans, Cleaver and Bauman to see if the publisher would approve the prospective purchaser. Bauman told Schwarzenbach that he would not be buying the 300 subscribers on Route 99 turned over to Kroner as "Route 198," and that new subscriptions 'phoned in to the newspaper would be given to Kroner on "Route 198," unless Petitioner dropped the suit and bought back the customers from Kroner—in which case Petitioner could sell to Schwarzenbach or could operate it himself if he would agree to charge the suggested retail price (R. 50-51). After this meeting, Schwarzenbach agreed to purchase Petitioner's part of Route 99 for $12,000.00 (R. 51-52, Plaintiff's Exhibit 12, *infra*, App. B). On December 1, 1964, Schwarzenbach bought the "Route 198" customers from Kroner for $3,600.00 (R. 80).

This case was filed August 12, 1964, in the United States District Court of the Eastern District of Missouri, Eastern Division, Meredith J. Jurisdiction was based on diversity and on the antitrust laws (28 U. S. C., Sec. 1332; 15 U. S. C., Sec. 15). Count I charged tortious interference with business relations and prayed judgment for loss of profits and for punitive damages. Count II charged violation of Sections 1 and 2 of the Sherman Act (15 U. S. C., Sections 1, 2), and prayed treble damages for loss of profits (R. 1-7). Supplemental complaint alleged continued acts of unlawful resale price maintenance and unlawful termination and prayed judgment for loss on sale price and loss of future profits (R. 12-13).

On December 10, 1964, Petitioner-Plaintiff moved for summary judgment, on the ground that the facts as stated above were set out in pleadings, exhibits or depositions of Globe-Democrat employees and were uncontroverted (R. 13-19). The Court was of the opinion that there were material facts in dispute and the motion was overruled on March 26, 1965 (R. 19). On May 4, 1965, by stipulation, Petitioner-Plaintiff dismissed Count I (R. 20, 141). Trial was had before the Court and a jury on May 5 and 6, 1965, postponed to May 10, 1965, and postponed again to May 13, 1965 (R. 141-142). The facts as presented by Petitioner-Plaintiff were not controverted. Respondent-Defendant's evidence consisted of the Union contract between the Globe-Democrat, the afternoon St. Louis paper (Post-Dispatch), and the Carriers' Union; Mr. Bauman's letter to Mr. Halls of May 16, 1961, concerning the termination of that contract; the News Dealers' policy statement of August 19, 1959; and the Respondent-Defendant's Carriers' policy statement of May 24, 1962 (R. 102).

Respondent-Defendant had moved for a directed verdict at the close of the Plaintiff's case. Ruling was reserved (R. 101). At the close of all the evidence, Plaintiff moved

for a directed verdict, on the ground that as a matter of law the facts showed a violation of Section 1 of the Sherman Act, both in the acts of interference and in the termination (R. 103-109). The Court reserved ruling on this motion, also (R. 109).

Petitioner-Plaintiff objected in chambers, on May 12, 1965, to those parts of the Court's proposed instructions that would require the jury to find a "common purpose" between the Globe-Democrat and some other person or persons in order to find a violation of Section 1 of the Sherman Act, and objected to the Court's refusal to give Plaintiff's Requested Instructions Numbers 25, 26 and 27, which would permit finding a violation if the facts showed that the Defendant overcame the independent business judgment of Plaintiff regarding retail price by any means that went beyond prior announcement and mere declination, regardless of whether Defendant was in concert or combination involving a "common purpose" with any third person or persons (R. 113, 119-120, 126). Plaintiff elected to go to the jury only on the issue of "combination", thus eliminating from the Court's instructions the standard instructions on conspiracy with their emphasis on common purpose, and amended its complaint accordingly (R. 111, 141).

On May 13, 1965, trial was resumed. The jury returned a verdict in favor of Respondent-Defendant, and judgment was entered accordingly (R. 131-132, 142).

On May 21, 1965, Petitioner-Plaintiff filed a motion for judgment n. o. v., or alternatively for a new trial, on the ground that the facts showed a violation as a matter of law of Section 1 of the Sherman Act, under **United States v. Parke, Davis & Co.** (1960), 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (R. 132-137, 142). On June 15, this motion was overruled (R. 137-138, 142). Notice of appeal was filed June 24, 1965 (R. 138, 142).

The Court of Appeals affirmed, holding:

(1) "Globe-Democrat's activity here did not hinder, but fostered and actually created competition to the benefit of the public" (App. A, p. 24).

(2) "Globe-Democrat did not combine with anyone" (App. A, p. 26).

(3) ". . . there was no coercion other than providing legal competition" (App. A, p. 27).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in conflict with applicable Supreme Court and Federal appellate decisions; does injustice to Petitioner and all home delivery newspaper carriers throughout the United States; and opens a serious gap in the enforcement of the antitrust laws.

From at least the time of the **Schrader** case, in 1920. it has been clear that the purpose of Section 1 of the Sherman Act with respect to resale price maintenance is to prevent the supplier from overcoming his customer's independent judgment on resale pricing by unacceptable means. **United States v. Schrader's Son, Inc.** (1920), 252 U. S. 85, 99. **Parke, Davis,** in 1960, said that so long as the **Colgate** doctrine was not overruled, overcoming the customer's independent judgment must be tolerated when it is the consequence of mere refusal to sell in exercise of the manufacturer's right of customer selection, but that:

> "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act." **United States v. Parke, Davis & Co.** (1960), 362 U. S. 29, 44.

One man, small in resources, but large in courage and faith, dared to believe that when he was cast out as an employee and lost the rights incident thereto, he then had the right to set his own price. For three years he withstood the pressure of being advised and requested to comply with the newspaper's suggested resale price. Just 19 days after the newspaper began to take away his subscribers by telling them they were being overcharged, and by employing Milne Circulation Sales Corporation to solicit away Petitioner's customers, Petitioner's independent business judgment was overcome and he reduced his price to $1.60, the suggested price. The newspaper tried to force Petitioner to agree to comply. It first turned the abducted subscribers over to another carrier, Kroner, so that they could be withheld as long as necessary; then offered to return them if Petitioner would agree to comply. When Petitioner sued, the newspaper terminated; refused to return the abducted subscribers so that the complete list on Route 99 could be sold to the new carrier; and then told Petitioner that if he bought back the subscribers from Kroner and dropped the suit, they would withdraw the termination if he would agree to comply with their resale price. Petitioner refused. Unless this petition is granted, a supplier will have been permitted to go far beyond mere announcement of its resale price policy and refusal to deal for non-compliance as permitted under **U. S. v. Parke, Davis & Co.**, supra. Instead, approval will have been granted to a supplier, which could not induce an independent merchant to comply voluntarily with its suggested resale price for newspapers, to solicit directly the merchant's customers and to entwine other persons, Petitioner's customers, Milne Circulation Sales Corporation and Kroner, in Respondent's efforts admittedly undertaken for the purpose of effecting adherence to its resale prices. As a matter of law, Respondent's efforts to maintain the resale price of its newspapers overcame Petitioner's independent judgment

on resale pricing by clearly unacceptable means, and thus violated Section 1 of the Sherman Act.

It is of great importance that the Respondent and others in his position should not suffer loss of profits and destruction of business for acting on the belief that, except for his supplier's narrow right of refusal to sell pursuant to customer selection, an independent merchant has the right to set his own price. It is of even greater importance that if the ruling below stands it will open a serious gap in the enforcement of the antitrust laws. Under this ruling every newspaper in the country can deny every home delivery carrier the benefits of an employee relationship, but still dictate his price. The publisher has sole control over whether carriers are employees or independent merchants, under the National Labor Relations Board rule. If the publisher reserves control over manner and means, carriers are employes; but if he reserves control only as to result sought, they are independent contractors. **Lindsay Newspapers, Inc.**, 130 N. L. R. B. 680 (1961), aff'd. 315 F. 2d 709 (C. A. 5, 1963). This rule was the basis for Respondent's refusal to enter into a new contract with the St. Louis Carriers Union in 1961, and the N. L. R. B. subsequently upheld that action by refusing to certify the union. **The Pulitzer Publishing Co.**, 146 N. L. R. B. 302 (1964), *infra*, p. 25. The cases of **Lindsay Newspapers, Inc.**, supra, and **The Pulitzer Publishing Co.**, supra, as well as the cases cited in those cases reveal how widespread the problem of carrier-publisher relationship is in the newspaper industry throughout the United States. Definitive determination of the questions raised herein with respect to newspaper carriers and newspaper publishers is, therefore, important. This case thus presents questions of intrinsic legal significance in an economic setting of national consequence.

The grounds given by the Court of Appeals for its affirmance cannot stand examination.

(1) **No restraint of trade because the consumer was benefited by a lower price.** This is squarely in conflict with the Supreme Court rule that the independent resale pricing judgment of the customer cannot be destroyed even for the purpose of benefiting the buyers at the next lower level of distribution. **Kieffer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.** (1951), 340 U. S. 211, 213. Consistently, in the **Standard Stations** case, the Court also refused to accept the position of the dissenting opinion, quoted herein by the court below (App. A, p. 17) that would permit the supplier to impose the control of requirements contracts on independent service station operators in order to avoid the possible greater restriction of vertical integration. **Standard Oil Co. v. United States** (1949), 337 U. S. 293, 318-320.

(2) **The newspaper did not connive with third persons who shared a common purpose injurious to Petitioner.** To require a common purpose between the supplier and a third person or persons as a requisite to finding unlawful resale price maintenance is in conflict with applicable Supreme Court decisions. The statement of the rule in **Parke, Davis** does not require any third person with whom the supplier acts in concert and common purpose, *supra*. It is true that on the facts of that case the manufacturer did act in concert and common purpose with wholesalers, and with some non-price cutting retailers, *supra*, at pp. 45-47. However, in the later case of **Simpson v. Union Oil**, this Court made it clear that only two parties—the supplier and his coerced customer—are requisite to finding unlawful resale price maintenance, when it held to be a violation the termination of a retailer's lease for refusal to accept an unlawful consignment agreement. **Simpson v. Union Oil Co. of Calif.** (1964), 377 U. S. 13, 17. If it should be argued that the case is different if no agreement is involved and "combination" must be the operative word of the statute, rather than "agreement", then the Court

of Appeals for the Eighth Circuit, herein, would be in conflict with the Courts of Appeals in the Fourth and Ninth Circuits, who have held in recent cases that a "combination" in violation of Section 1 of the Sherman Act is created when, in the absence of any agreement between them, a gasoline supplier by his own unilateral coercion overcomes the independent judgment of his retailer-customer and imposes upon him resale prices or tied products. **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566, 573-575 (C. A. 4, 1963); **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459, 466, 472 (C. A. 9, 1964).

(3) **The pressures against Petitioner were not "coercion" because they were "competition".** Acts lawful in themselves may be violations of the antitrust laws when done with an intent to unreasonably restrain trade. **Poller v. Columbia Broadcasting System, Inc.** (1962), 368 U. S. 464, 468. However, there is no need to consider whether good faith competition would be an exception to the narrow rule of **Parke, Davis.** Herein the newspaper had no intent to go into the carrier business, sought no profit from it, delivered papers for the shortest possible time, asserted no proprietary interest in the customer list, and never ceased to use the abducted subscribers as a lever to pry out of Petitioner agreement to comply with its suggested resale price. No case could be more clearly outside the tort immunity of "competition" as defined by the leading case of **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599, and Section 709 of the Restatement of Torts.

CONCLUSION.

The ruling below reflects a serious failure to follow the applicable decisions of this Court, allows injustice to be done to Petitioner, and opens a gap in the enforcement of the antitrust laws, which could be exploited by every

newspaper publisher in the United States. This petition for a writ of certiorari should, accordingly, be granted.

Respectfully submitted,

By .....
DONALD S. SIEGEL,
BARTLEY, SIEGEL & BARTLEY,
130 South Bemiston Avenue,
Clayton, Missouri 63105,
PA 7-0922,
GRAY L. DORSEY,
122 Ridge Crest Drive,
Chesterfield, Missouri 63017,
HO 9-3362,
Attorneys for Petitioner.

Certificate of Service.

State of Missouri, }
County of St. Louis. } ss.

I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 13 day of January, 1967, I served 2 copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By .....
Donald S. Siegel,
Member of the Bar of the United States Supreme Court.

APPENDIX.